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IN THE

Supreme Court of the United States

October 1984 Term

No. 4-83-28

MICHAEL JOSEPH SADOSKY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

MAY LAW ENFORCEMENT OFFICERS RELY UPON PETITIONER'S PRIOR CONDUCT AS A BASIS FOR INFERRING SUSPICIOUS CONDUCT FOR PURPOSES OF AN INVESTIGATIVE STOP AND SEIZURE WHERE OFFICERS HAD AMPLE PRIOR OPPORTUNITY TO INVESTIGATE THAT CONDUCT AND FAILED TO DO SO?

II.

COULD LAW ENFORCEMENT OFFICERS, AS A MATTER OF LAW, HAVE FORMULATED A REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY ON THE BASIS OF THE OBSERVED CIRCUMSTANCES OF THIS CASE?

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on May 15, 1984.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 732 F.2d 1388. The order of the Court of Appeals denying petitioner is unreported, however, such order is reprinted in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was dated and entered May 15, 1984. An order of the Court of Appeals

denying rehearing and rehearing en banc was dated and entered June 26, 1984. Jurisdiction is based upon 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following portions of the Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons. houses, papers and effects, against unreasonable searches and seizures shall not be violated. . ."

STATEMENT OF THE CASE

In an indictment filed in United States District Court for the District of Minnesota, petitioner was charged with knowingly and intentionally possessing with intent to distribute approximately 345 grams of cocaine in violation of 21 U.S.C. §841.

The evidence shows that on March 17, 1983 petitioner was observed by two Minnesota Bureau of Criminal Apprehension agents while disembarking from a flight which had arrived at the Minneapolis-St. Paul Airport from the Cayman Islands, Miami and Atlanta.

Both officers recognized petitioner from prior observations. Officer Mortenson on the previous day had observed the petitioner walking towards gate 71 where a flight to the Cayman Islands was waiting to depart. Agent Olby on May 1, 1983, some 16 days prior, had observed the petitioner disembarking from a flight which had arrived at the Minneapolis-St. Paul Airport from Miami and Atlanta. On that prior occasion petitioner was wearing sunglasses and "appeared nervous, occasionally looking over his shoulder and

from side to side. . ." as he proceeded to the baggage claim area. Petitioner paced and looked at others as he waited for his luggage. When the luggage didn't arrive, petitioner filed a baggage claim report with the airline. Agent Olby learned from the airline that petitioner gave airline personnel the name William Ryan, an address and a telephone number later found to be that of petitioner's brother. The name William Ryan did not correspond with the address or the telephone number.

Officers Olby and Mortenson, on March 17, observed that petitioner was again wearing sunglasses and acting "nervous" as he disembarked from his flight carrying a small duffel bag. Petitioner looked to his left and "stared" at the agents, who were clothed in street attire, and then proceeded away from the gate area and towards the airport terminal. Petitioner passed a security checkpoint for passengers boarding departing flights, stopped and looked at the x-ray equipment, then proceeded through the airport terminal toward an exit, occasionally glancing over his shoulder. Petitioner did not stop at the baggage claim area on this occasion.

Agents approached petitioner outside the airport terminal, identified themselves as law enforcement officers and stated that they wanted to ask petitioner some questions. Petitioner agreed to cooperate and informed officers that he had just arrived on an incoming flight. Agents asked that petitioner show them his ticket. Petitioner responded that he no longer had his ticket and asked the officers why he was being hassled. Officers informed petitioner that he was not under arrest and was free to leave. Officers then asked petitioner to produce his identification. Petitioner refused to do so unless he was under arrest. Agents

again informed petitioner that he was free to go, but that they were investigating possible narcotics violations and that because of his "unusual behavior" they wanted to ask him some questions. Petitioner in subsequent conversation denied departing from the Minneapolis-St. Paul Airport on the preceding day, and refused to allow agents to search his bag unless he was under arrest. Agents then informed petitioner that while he was still free to go, they were going to seize his bag so that a narcotics detection dog could be brought in to sniff the bag. Petitioner then asked that he be allowed to consult an attorney, and returned to the terminal, followed by the agents, for the purpose of placing a telephone call to an attorney. Petitioner was subsequently arrested while on the telephone after a third agent observed the petitioner transfer something "white" and "shiny" from his bag to his jacket pocket. Cocaine was seized at the time of this arrest pursuant to a search of petitioner's person.

Petitioner asserted in his motion to suppress and during his trial on stipulated facts that the evidence obtained at the Minneapolis-St. Paul Airport should have been excluded because that evidence was obtained as a result of an unlawful stop and was obtained pursuant to a warrantless arrest without probable cause. The trial court rejected these contentions and found petitioner guilty of the charges against him.

The Court of Appeals affirmed appellant's conviction expressly relying on the fact that when the stop occurred, the law enforcement agents were aware that:

> (1) When first observed at the Minneapolis-St. Paul Airport on March 1, 1983, petitioner was wearing sunglasses and, according to Agent Olby, behaved nervously;

(2) In a lost baggage report filed on March 1, 1983, petitioner gave the airline the name William Ryan. Petitioner also listed an address and a telephone number in this report. Neither the address nor the phone number corresponded to one another nor to the name William Ryan;

(3) Petitioner was seen at the airport at approximately 1:30 p.m. on March 16, 1983 heading toward a gate at which a flight was about to depart for Miami and the Cayman Islands;

(4) Petitioner was seen at the airport at approximately 2:30 p.m. on March 17, 1983 as he got off a flight that had just arrived from the Cayman Islands, Miami, and Atlanta.

(5) On March 17, 1983, petitioner appeared very interested in an X-ray machine at an airport security checkpoint even though as an arriving passenger, he did not have to pass through the checkpoint as would a departing passenger;

(6) On March 17, 1983, petitioner again, according to Agent Olby, behaved nervously and was wearing sunglasses; and,

(7) On March 17, 1983, during the conversation outside the airport terminal, petitioner told the agents that he did not have an airline ticket, even though it was known that he had just gotten off an arriving flight.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals holding the aggregate knowledge of law enforcement officers sufficient to create a reasonable and articulable suspicion of criminal activity is clearly erroneous and conflicts with this Court's decisions in *Terry v. Ohio,* 392 U.S. 1 (1968), and *Reid v.*

Georgia, 448 U.S. 438 (1980) (investigative seizures must be supported by a reasonable, articulable suspicion of criminal activity).

Some of the factors relied upon by law enforcement agents are suspicious only because of patently unreasonable conclusions drawn from them, or because of agents' own failure to investigate despite adequate opportunity to do so. Petitioner's failure to show agents his airline ticket must not be allowed to raise an inference that petitioner was attempting to conceal his travel, where petitioner was arriving on an incoming flight and had no logical reason to retain his ticket, and where petitioner informed officers that he had just arrived upon an incoming flight. Such an inference is wholly unsupported. Similarly, the lost baggage information given by petitioner to airline personnel should not be allowed to raise an inference of suspicious conduct where other reasonable explanations exist as to why petitioner left that information, and where agents, despite ample opportunity, failed to investigate.

Other factors may also be quickly and easily dismissed or explained. The officers noted that upon two occasions the petitioner was wearing sunglasses. On both occasions, however, he had just arrived on flights from locations known for their sunny climates; the first flight from Florida and the second from the Cayman Islands, Miami and Atlanta. Certainly it is not unexpected that a person arriving on such flights might be wearing sunglasses. The MBCA officers also claim petitioner was acting in a nervous manner. When asked what behaviors lead them to this conclusion, the officers stated petitioner looked around the airport and over his shoulder, and that he paced while waiting for his baggage. It must be remembered than in

retrospect, the petitioner may have engaged in these behaviors because he was in possession of a controlled substance. The question that must be answered, however, is whether at the time the agents observed the petitioner, without any knowledge of the contents of his luggage, his behavior was different from that of other travelers. Agent Olby admitted in testimony that he had observed other presumably innocent passengers looking around the airport or over their shoulders. He further admitted that people engaging in this conduct are usually looking for someone whom they are to meet, and that he did not know whether petitioner was waiting for someone else. Agent Olby also testified that he had observed other individuals who paced back and forth while waiting for their luggage. Officers were similarly aware that petitioner had departed from the airport on a flight to Miami and the Cayman Islands and returned the next day. Persons presumably fly millions of passenger miles on business trips to Florida, Georgia, California, New York, or other locals. These persons then transact their business and return, all in a relatively short period of time. Nothing known to the agents at the time of petitioner's flight could serve as a basis for distinguishing petitioner from this large class of business passengers who engage in the same conduct. Finally, agents thought it suspicious that the petitioner stopped to observe the airport X-ray machines. Agent Olby admitted in testimony, however, that he had observed others who stopped, presumably out of curiosity, to observe the machine.

It becomes apparent, then, that none of the factors known to MBCA agents while observing the petitioner were sufficient alone or in combination to distinguish petitioner from the large numbers of other travelers observed by the agents

during their work at the airport. Under the principals of *Terry*, petitioner was thus subjected to an unreasonable stop in violation of the Fourth Amendment. Any subsequent evidence obtained must, therefore, be suppressed because it never would have been obtained had petitioner not first been subject to the illegal stop. *Wong Sun v. United States*, 371 U.S. 471 (1963) (Evidence obtained as a result of a prior illegal detention of defendant and his property should be suppressed as fruits of the Fourth Amendment violation).

Correctly viewed, this case is indistinguishable from *Reid v. Geeorgia*, 448 U.S. 438 (1980). In *Reid*, a DEA agent on the basis of a "drug courier profile" approached two individuals, identified himself as a federal narcotics agent, and asked the men to show their airline ticket stubs and identification, which the men did. The agents then asked the men if they would come back to the terminal and consent to a search of their persons and their shoulder bag. The men consented to return but on the way as they entered the terminal, one of the men began to run, abandoning his should bag which was found to contain cocaine. Thus court held that the curtailment of Reid at the airport constituted a seizure of his person which "must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity" 448 U.S. at 440. Even seizures that involve only a brief detention short of traditional arrest were held to require a reasonable and articulable suspicion. In rejecting the lower appellate court's holding that Reid's conduct had constituted such a "reasonable suspicion", the Supreme Court stated:

> We conclude the agent cannot as a matter of law, have reasonably suspected the petitioner of criminal

> activity on the basis of these observed circumstances. Of evidence relied on, only the fact that the petitioner proceeded another person and occasionally looked backwards at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the court to conclude that as little foundation as there was in this case could justify a seizure. . . . Although there could, of course, be circumstances in which wholly and lawful conduct might justify the suspicion that criminal activity was afoot, see *Terry v. Ohio,* supra 392 U.S. at 27-28, 88 S.Ct., at 1883, this is not such a case. The agents' belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and unparticularized suspicion or "hunch' ", 291 U.S. at 27, 88 S.Ct., at 1883, that a fair inference in the light of his experience, is simply too slender of reed to support the seizure of this case.

Reid, 448 U.S. at 441.

No distinction should be made between the facts in *Reid* and those of this case simply because the agent in *Reid* articulated his suspicions to be a "hunch", whereas in this case Agent Olby, although clearly acting on a hunch, chose not to articulate it as such. The prosecution did not meet its burden of proving that petitioner's behavior varied in any articulable way from "a very large catgory of presumably innocent travelers".

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

83-1876-MN. September Term, 1983

United States of America,

Appellee,

vs.

Michael Joseph Sadosky, a/k/a William M. Ryan,

Appellant.

Appeal from the United States District Court for the District of Minnesota

The petition of appellant for rehearing and suggestion for rehearing en banc is denied. On the Court's own motion, the panel opinion of March 28, 1984 is withdrawn and the judgment of the Court is vacated. The opinion filed this date is substituted for the withdrawn opinion. The parties shall have the time provided by Federal Rule of Appellate Procedure 40 for the filing of any motions for rehearing.

May 15, 1984

(Title of Cause.)

The Court, having considered appellant's petition for rehearing and suggestion for rehearing en banc and being now fully advised in the premises, is hereby denied.

Judges Gerald W. Heaney, Myron H. Bright and Theodore McMillian would grant the petition.

June 26, 1984